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Judge José Luis Jesus

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Judge José Luis Jesus, born 20 September 1950, in Santo Antão, Cape Verde, has been President of the International Tribunal for the Law of the Sea (ITLOS) since October 2008. Merkourios inquired into the every-day functioning of this relatively novel institution. In what way does the Tribunal contribute to the body of sea law? And importantly, does another law of the sea tribunal add to the perceived 'fragmentation of international law'?

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The majority of cases that the ITLOS has been asked to address thus far have concerned 'prompt-release cases', meaning that a state party to the UNCLOS has seen fit to detain a vessel flying the flag of another state party, ostensibly, for illegal fisheries in the Exclusive Economic Zone (EEZ) of the detaining state or illegal dumping. The ITLOS is then asked to decide on the reasonableness of the bond offered for release.

How does the ITLOS go about answering that question?

In its case-law the Tribunal has developed several criteria relating to prompt release of vessels and crew for the determination of the reasonableness of the bond which should be posted by or on behalf of the flag state as a pre-requisite for the release of vessels and crew. These criteria include inter alia the value of the vessel, the value of the catch found onboard and the fines that are imposable by the detaining state.

'The principle is that all disputes are dealt with by the Tribunal as a full court.'

Do you agree with the proposition advanced in legal literature that, because the judges of the ITLOS rarely seem to disagree in determining that the allegation of a breach of the United Nations Convention on the Law of the Sea (UNCLOS) by the detained state is 'well-founded', 'prompt-release' cases should, in the interest of (cost-) efficiency, no longer be heard by the entire bench but instead by a chamber of two or three judges?

The principle is that all disputes are dealt with by the Tribunal as a full court. That is what is stated in paragraph 3 of Article 13 of the Tribunal's Statute which establishes that '[a]ll disputes and applications submitted to the Tribunal shall be

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heard and determined by [it], unless Article 14 applies[1] or the parties request that it shall be dealt with in accordance with Article 15 ...'. Paragraph 4 of Article 15 of the Statute establishes that '[d]isputes shall be heard and determined by the chambers provided for in this article if the parties so request.'[2] This provision makes it clear that any of the chambers mentioned in the article referred to above may only entertain a dispute if both parties to such a dispute so request. Concerning prompt-release requests, paragraph 2 of Article 112, of the Rules of the Tribunal admit the possibility that such requests may be entertained by the Chamber of Summary Procedure (a body composed of five elected members of the Tribunal), 'provided that within five days of the receipt of notice of the application the detaining state notifies the Tribunal that it concurs with the request.'[3] Historically, almost all the prompt-release cases have been submitted to the Tribunal on a compulsory basis by or on behalf of the flag State without any request that they be referred to a chamber. There was a case in which the Applicant requested that it be dealt with by a chamber but the Respondent did not agree to the request. Therefore, all these cases have been dealt with by the Tribunal as a full Court. Admittedly, having in mind the urgent nature of the prompt-release proceedings, it might not be practicable to refer a prompt release request to a chamber. Be as it may, the referral of a prompt-release case to chambers can only take place if the two parties so request and agree. The Tribunal does not seem to have a *motu proprio* role to play under the circumstances.

'There was a case in which the Applicant requested that it be dealt with by a chamber but the Respondent did not agree to the request.'

It has been noted that the ITLOS' competence to provide for provisional measures is different from the power enshrined in the International Court of Justice (ICJ) Statute. This contention seems to be provoked by the different wordings that both the ICJ Statute (art. 41: 'indicate') and the UNCLOS (art. 290(1): 'prescribe') use. Does this difference indeed mean that ITLOS' provisional measures when 'prescribed' are more compelling in terms of enforceability than those 'indicated' by the ICJ? Are there any additional differences between the ICJ's competence and the ITLOS' competence to deal with (requests for) provisional measures?

'The language used in the ITLOS Statute is straightforward, leaving no doubts as to the binding force of the measures that it may "prescribe".'

Under the UNCLOS, ITLOS may be requested to impose provisional measures in two situations: under Article 290, paragraph 1, in situations in which it is seized of a case on the merits (See the recent request for provisional measures decided by ITLOS in the M/V Louisa Case); and under 290, paragraph 5, when a request for provisional measures is made to ITLOS, pending the constitution of an arbitral tribunal pursuant to Annex VII of the UNCLOS to which the case on the merits has been referred (See the first four Cases for provisional measures filed with the Tribunal). In both proceedings the Tribunal 'prescribe' provisional measures, meaning that States parties involved are obliged to abide by and implement such measures, if prescribed. The language used in the ITLOS Statute is straightforward, leaving no doubts as to the binding force of the measures that it may 'prescribe'. The different wording found in the equivalent provision of the ICJ Statute, which instead of 'prescribe' refers to 'indicate', may not in practise mean a substantial difference as to the enforceability of the provisional measures that may be decided by the two Courts. In the case of the ICJ, however, the binding force of measures it may 'indicate', may need to be stated in the decision due to the ambivalent meaning of the word 'indicate'.

To what extent is the functioning of the ITLOS hindered by provisions in the UNCLOS that allow state parties to withdraw jurisdiction from the Tribunal? For instance, Article 290(5) UNCLOS provides that state parties may request ITLOS to prescribe provisional measures if it considers that, prima facie, the tribunal which the parties wish to seize for adjudication of the dispute on its merits, enjoys jurisdiction. If that tribunal later rules that it lacks jurisdiction, the measures prescribed by ITLOS will be revoked.[4]

In this case I do not believe that the jurisdiction of the Tribunal is hindered, as your question seems to suggest. In fact, if anything, the jurisdiction of the Tribunal is in this case increased to

1 This article refers to the Seabed Disputes Chamber, which has exclusive jurisdiction over disputes relating to the seabed activities in the Area (Part XI, Annexes III and IV of the Convention). In this case all such disputes are to be handled only by this Chamber.

2 See Article 108/1 of the Rules of the Tribunal.

3 See paragraph 2 of Article 112 of the Rules of the Tribunal.

4 See, eg, *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan) (hereinafter *Southern Bluefin Tuna*), (Arbitral Tribunal constituted under Annex VII of the *United Nations Convention on the Law of the Sea*), Award of 4 August 2000, available at <http://www.worldbank.org/ icsid/bluefintuna/award080400.pdf> accessed 20 December 2010.

the extent that the Tribunal may deal with a request for provisional measures related to a case on the merits being dealt with by another tribunal - the Annex VII arbitral tribunal. In normal circumstances, ITLOS would not have jurisdiction to entertain such requests, bearing in mind that it is not the Court entrusted with the case on the merits. However the Law of the Sea Convention, pursuant to Article 290, paragraph 5, introduced an innovation by allowing a different court (in the instant case, ITLOS) to entertain a request for provisional measures that is related to a case whose merits will not be dealt with by it.

The issue of the arbitral tribunal finding later that it has no jurisdiction to entertain the case on the merits, contrary to the *prima facie* jurisdiction finding made previously by ITLOS, is not to be seen at all as a hindrance to the jurisdiction of ITLOS. This is in fact the general situation that may occur in relation to not only requests for provisional measures made to ITLOS, but also to the ICJ.

Any time a request for provisional measures is made to the ICJ (under Article 41 of its Statute) or to ITLOS (whether under paragraph 1 or paragraph 5 of Article 290 of UNCLOS), prior to the full assessment of the merits of the case, the ICJ or the Tribunal, as the case may be, will not in most cases be in a position to decide, in a definitive way, at the stage of the request for provisional measures, whether or not it has or does not have jurisdiction to entertain the case on the merits. At the early stage of the proceedings, in most cases, it can only decide on its *prima facie* jurisdiction (a mere possibility). It is only later, upon the presentation of the full arguments, that the Tribunal (or as the case may be, the ICJ) may finally decide, in a definitive way, that it has or does not have jurisdiction to entertain the merits case. Sometimes these two Courts, having considered the full arguments of the case on the merits, may finally decide that, contrary to their *prima facie* findings, they actually do not have jurisdiction over the case. This is what has happened in some cases handled by the ICJ. This might happen with ITLOS and this is what happened in *Southern Bluefin Tuna* when the arbitral tribunal found that it had no jurisdiction to entertain the case. This situation is not therefore peculiar to ITLOS.

'At the early stage of the proceedings, in most cases, it can only decide on its prima facie jurisdiction.'

'The Tribunal in fact is extremely well positioned to deal with the bulk of law of the sea disputes as a specialised Court in this field.'

Additionally, the UNCLOS in Article 287 lists various procedures for dispute settlement that state parties may elect as their primary choice other than the ITLOS. As of yet only 13 states have chosen ITLOS as their primary dispute settlement tribunal. Lastly, in respect of Europe, the EU has absorbed exclusive competence over matters falling within the scope of the EC Treaty such as protection of the marine environment and the preservation and exploitation of sea fishing resources,[5] as was evident from the proceedings the Commission of the European Communities instituted before the European Court of Justice against Ireland for breach of Article 292 EC[6] since Ireland had brought a case regarding EC law before ITLOS and another tribunal in accordance with UNCLOS.[7] Could you comment on the submission that the ITLOS thus is: '[o]nly a court of first instance, useful for an initial hearing of the facts and for seeking provisional measures or prompt release, but not for a final determination of the dispute'?[8]

Firstly, I would like to clarify that there are more than 13 States that have selected the Tribunal as their forum of choice for law of the sea dispute settlement. As of now, there are in fact 30 States. Secondly, it is obvious from the reading of its statute that ITLOS has jurisdiction to entertain all kinds of disputes and applications provided they are related to the interpretation or application of any provision of the law of the sea Convention or they are submitted to it pursuant to an international agreement related to the purposes of the UNCLOS which specifically confers jurisdiction upon it. ITLOS deals not only with prompt-release cases and requests for provisional measures, but also with cases on the merits. It has in fact received 4 cases on the merits. Of these one has been solved (the *"SAIGA" (No. 2) Case* [9]), one was discontinued

5 See EC Declarations, available at <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm> last accessed 20 December 2010.

6 Which reads: 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.'

7 Case C-459/03 *Commission v. Ireland* [30 May 2006], available at <http://www.eur-lex.europa.eu> accessed 20 December 2010.

8 D R Rothwell, 'Building on the Strengths and Addressing the Challenges: The Role of Law of the Sea Institutions' (2004) 35 Ocean Development and International Law 148.

9 *The M/V "SAIGA" (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea) ITLOS Order of 11th March 1998.

as it was solved out of court, and two are pending before the Tribunal. The Tribunal in fact is extremely well positioned to deal with the bulk of law of the sea disputes as a specialised Court in this field. The variety of law of the sea matters that have been the object of the cases submitted to ITLOS indicates that ITLOS is the primary Law of the Sea Court. I am sure that this trend will continue, contrary to the speculation of some writers.

In addition, from the analysis of the cases entered, the following observations may be made:

a) The Tribunal received its first case in 1998. Since then, it has been building, one by one, its docket. The pace being followed by the Tribunal was also experienced by other international courts when they started their work. As Judge Higgins put it '[T]he experience of most international courts is to start slowly and steadily build their docket.'[10]

b) The Tribunal has nonetheless a good record of cases referred to it, as it has received 18 cases in 14 years. This is even more impressive, if account is taken of the fact that the Tribunal is a novel institution and, as a specialised court, has a limited jurisdiction *ratione materiae* to deal only with law of the sea related disputes and applications;

c) The cases received involved developed and developing countries from all regions of the world, as disputant states, which shows a global trend and not a regional proclivity;

d) The disputes submitted to the Tribunal covered a wide range of law of the sea issues, such as protection of the marine environment, conservation of marine living resources, prompt release of vessels and crews, delimitation of maritime boundaries, responsibility and liability of sponsoring states and compensation for illegal detention of vessels.

e) The Tribunal received, by far, the highest number of cases amongst the courts and tribunals listed in Article 287.

'The Convention provides an extensive international regulation of the law of the sea.'

Recently, debate has aroused as to the so-called 'fragmentation of international law' which seems to be induced by the increased 'proliferation' of various courts and tribunals which each deliver slightly discrepant interpretations of prevailinginternational law.[11] What is your view on these concerns in light of the fact that international law of the sea appear a well catered for area of law in terms of available dispute settlement procedures?

To respond to this question, I will have to extend myself a bit. It may be of interest to you to know about the law that ITLOS has applied to deal with the legal issues raised by cases brought before it for resolution. ITLOS has applied the Convention and it has also applied other rules of international law not incompatible with the Convention.

The Convention provides an extensive international regulation of the law of the sea. It includes rules of customary law, as well as several new provisions reflecting the progressive development in this field achieved during negotiations at the Third UN Conference on the Law of the Sea.

By applying the Convention to a concrete case, the Tribunal applies not only the new treaty provisions that it contains, but also the general international law that it codifies, as well as rules and standards found in agreements of a technical nature that have been absorbed by it through references to those agreements in several of its articles.[12]

In many instances, as shown in its case-law, the Tribunal has been able to solve most legal issues raised in the context of a dispute submitted to it within the framework of the provisions of the Convention. Indeed, in a number of cases entertained by the Tribunal, the provisions of the Convention provided all the necessary legal guidance.

In the absence of sufficient guidance from the Convention, however, the Tribunal also applies 'other rules of international law not incompatible with the Convention', as mandated by Article

10 Speech made by Rosalyn Higgins on the occasion of the 10th Anniversary of the Tribunal.

11 See eg, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the International Law Commission, UN Doc A/CN 4/L 682/Add 1, 2 May 2006.

12 See, *inter alia*, arts 24 (4), 39 (2), 41 (3), 53 (8) 94 (2a) and 95 (5) of the Convention.

293, paragraph 1.[13]

The reference to 'other rules of international law' in Article 293 of the Convention should be understood to include rules of customary international law, general principles of law which are common to the major legal systems of the world transposed into the international legal system,[14] and rules of a conventional nature.

The application of the norms of customary law and general principles of law becomes relevant, as evidenced in the Tribunal's jurisprudence, in situations where, to use the terminology of a working group of the International Law Commission, the provisions of the Convention are 'unclear or open textured'; where 'the terms or concepts used in the [Convention] have an established meaning in customary law or under general principles of law'; or where the Convention does not provide sufficient guidance,[15]

How have these different manifestations of recourse to 'other rules of international law' been articulated in the cases resolved by the Tribunal? The Tribunal has done so, especially by resorting to relevant pronouncements in the case law of the Permanent Court of International Justice (PCIJ) and the ICJ as a means to identify relevant rules of customary law and general principles of law to support its legal findings and positions. It has also referred to certain treaty sources, though sparingly and in one instance it also relied on pronouncements of arbitral tribunals.

This shows that, as mentioned before, in dealing with cases, ITLOS has backed its findings and conclusions by resorting often to the case law of the PCIJ and ICJ, as a source for the identification of customary law and general principles of law, where the Convention did not provide sufficient guidance. This is an unequivocal reliance on the jurisprudence of other international courts and tribunals, clear evidence that, at least in the ITLOS case, the concerns about fragmentation of the jurisprudence of international courts and tribunals are not at all warranted. ■

13 See art 293 para 1 of the Convention, and Annex VI, arts 23 and 38.

14 R R Churchill and A V Lowe *The Law of the Sea* (3rd edn, Juris Publishing 1999).

15 See draft conclusions of the Study Group of the International Law Commission in 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the International Law Commission, UN Doc A/CN 4/L 682/Add.1, 2 May 2006.